APPEAL NO. 93117

A contested case hearing was held in (city), Texas, on January 12, 1993, (hearing officer) presiding, to determine two disputed issues, namely, whether respondent (claimant) was injured in the course and scope of his employment on (date of injury), 1992, and, the period during which he had disability under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). The hearing officer determined that claimant established by a preponderance of the evidence both that he sustained a compensable injury on (date of injury)th and that he had disability from September 10 to December 12, 1992. Appellant (carrier), the workers' compensation insurance carrier for (employer), challenges the sufficiency of the evidence to support the hearing officer's factual finding that claimant was struck on his left shoulder by a cedar board and reacted by jerking his neck. Carrier also challenges the hearing officer's legal conclusion that claimant proved he had disability from September 10 to December 12, 1992. The claimant's response urges our affirmance.

DECISION

Finding the evidence sufficient to support the challenged finding and conclusion, we affirm.

The hearing officer's Decision and Order contains a comprehensive statement of the evidence with which the carrier has stated it essentially agrees. Accordingly, we do not here set forth the evidence in detail. Succinctly, claimant testified that in 1979, he sustained a serious work related neck injury involving a fractured cervical vertebra which required surgery. He had fully recovered from that injury and had not had any therapy, other treatment, or problems with his neck for years prior to his neck injury of (date of injury), 1992. On that date, while standing beside his desk at work, a carpenter, Mr. B, who was converting a window to a door, did some hammering in claimant's direction and a piece of cedar trim approximately 4 inches wide and weighing under 5 pounds struck claimant's left shoulder from the rear and bounced onto the floor. It happened as claimant was straightening up after having bent over his desk. The statement of the carpenter who struck the fateful blow corroborated claimant's having been struck by the board. Mr. B's statement said the board hit claimant and scared him, and that claimant reacted as if someone had come up behind him and jabbed him in the side. Claimant said the blow surprised him and he jerked his head in reaction. He attributed his neck injury to his having jerked his head in reaction and felt this aggravated his old neck injury. Claimant said he reported the incident that day to both his supervisor, Mr. Smith, and to the general manager, Mr. H, and continued to work. He did not seek immediate medical attention but later began to experience neck pain and stiffness of which he complained from time to time to both his fiancee and his roommate.

On or about Labor Day, claimant was sitting on a couch watching a football game on TV with Ms. I, his fiancee, when Ms. I reached around claimant and pulled him towards her to give him a hug. He felt a shock go down his back and commented that he guessed his neck injury (referring to (date of injury)th) was worse than he had thought. He called his

supervisor on September 10th and told him he was going to see his doctor, Dr. M, the next day about his neck pain. While having mentioned the hugging incident, he did not tell Mr. S his neck pain resulted from his having been struck by the board. Claimant sought medical attention from Dr. M on September 11, 1992. He said he told Dr. M, and later a referral doctor, about both being struck by the board and the hugging incident. Claimant's fiancee corroborated claimant's testimony in certain regards, as did his roommate, Mr. B, and the carpenter.

The carrier's contention at the hearing was that claimant's being struck by the board was a workplace "incident" rather than an "injury," and that his injury was caused by his fiancee's hug. Carrier argued that this contention was shown by claimant's not seeing a doctor until after the hugging incident, the failure of the history given to Dr. M to reflect the board striking incident, and claimant's not having mentioned to his supervisor, or to the general manager, that he was injured when struck by the board. To defeat a claim for a current injury because of a preexisting or subsequent injury, the burden is on the carrier to show that the preexisting or subsequent injury is the sole cause of the present incapacity, and an injury may be compensable even though aggravated by a subsequently occurring injury or condition. *See* Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991. The carrier's position respecting the issue of disability was that claimant did not have disability (Article 8308-1.03(16)) because he did not prove he had a compensable injury (Article 8308-1.03(10)). Claimant, on the other hand, introduced evidence that he was taken off work by Dr. M on September 11th for several weeks. He testified he subsequently attended prescribed physical therapy sessions when he could get to them and remained off work until December 12th when he resumed his employment upon his release to return to work by Dr. N. He argued that his weekly temporary income (TIBS) benefit checks in the amount of $438.00, contrasted with his monthly earnings in excess of $6000.00, hardly constituted an incentive to remain away from work any longer than necessary to recover from his injury.

The carrier challenged the factual finding that claimant was struck on the left shoulder by the cedar board and reacted by jerking his neck (but did not challenge the legal conclusion that claimant sustained a compensable injury). Carrier also challenged the legal conclusion that claimant proved by a preponderance of the evidence that he had disability from September 10 to December 12, 1992 (but did not challenge the factual finding that claimant was unable to work because of his cervical strain from September 10 until December 12, 1992). The hearing officer is the sole judge of the weight and credibility of the evidence (Article 8308-6.34(e)), and we do not substitute our judgment for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ.) Neither the challenged finding nor conclusion are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629

(Tex. 1986). That the evidence may give rise to equally supportable inferences, is not a sound basis to disturb a fact finders determinations. *See* Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The carrier expresses concern on appeal that the hearing officer shifted the burden of proof to the carrier in that the hearing officer, in her Decision and Order, set forth a detailed list of various items of evidence which the hearing officer asserted the carrier could have but did not obtain and introduce. However inarticulately stated, we are satisfied the hearing officer understood that claimant, not the carrier, had the burden of proving both disputed issues by a preponderance of the evidence since the hearing officer so instructed the parties at the outset of the hearing, and also stated in the key legal conclusions that claimant had indeed met that burden. Having said this, however, we by no means regard it as advisable for a hearing officer to recite in a Decision and Order all the various items of evidence the hearing officer can think of which might have resulted in a different outcome had such been obtained and offered. Indeed, such comment by its nature is speculative and may overlook cogent reasons for not introducing such evidence. Too, it can, as here, give rise to an erroneous perception that appropriate legal principles are not being applied.

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge